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STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
(Zahra, P.J., and Cavanagh and Owens, JJ.)

CARRIER CREEK DRAIN DRAINAGE DISTRICT, **Plaintiff/Appellee** **vs.** **LAND ONE, L.L.C.,** **Defendant/Appellant.**	**Supreme Court Docket No. 130125** **Court of Appeals Docket No. 255609** **Eaton County Circuit Court Docket NO. 03-67-CC**
CARRIER CREEK DRAIN DRAINAGE DISTRICT, **Plaintiff,** **vs.** **ECHO 45, L.L.C.,** **Defendant/Appellant.**	**Supreme Court Docket No. 130126** **Court of Appeals Docket No. 255610** **Eaton County Circuit Court Docket No. 03-68-CC**
CARRIER CREEK DRAIN DRAINAGE DISTRICT, **Plaintiff,** **vs.** **LAND ONE, L.L.C.,** **Defendant/Appellant, and** **STANDARD FEDERAL BANK,** **Defendant.**	**Supreme Court Docket No. 130127** **Court of Appeals Docket No. 255611** **Eaton County Circuit Court Docket No. 03-69-CC**

BRIEF ON BEHALF OF AMICUS CURIAE REAL PROPERTY LAW SECTION OF THE STATE BAR OF MICHIGAN SUPPORTING APPLICATION FOR LEAVE TO APPEAL

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BRIEF ON BEHALF OF AMICUS CURIAE REAL PROPERTY LAW SECTION OF THE STATE BAR OF MICHIGAN SUPPORTING APPLICATION FOR LEAVE TO APPEAL

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STATEMENT IDENTIFYING JUDGMENT APPEALED FROM

Amicus curiae Real Property Law Section of the State Bar of Michigan (the "Real Property Section") concurs in and adopts by reference the statement of Orders Appealed From and Relief Sought provided in Defendants/Appellants' (the "Owners") Application for Leave to Appeal.

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STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

The Owners and Plaintiff/Appellee Carrier Creek Drain Drainage District (the "Drain District") have addressed several issues in their respective filings. The Real Property Section addresses only one issue arising under the Uniform Condemnation Procedures Act, MCL 213.51 et seq. (the "UCPA"), which relates to land that belonged to Defendant/Appellant Echo 45, L.L.C. ("Echo 45"):

The Drain District submitted a statutory written offer to compensate Echo 45 for its land. Under the UCPA, if Echo 45 intended to claim a right to compensation for any "items of property or damage" for which the Drain District had not offered compensation, then Echo 45 was required to submit a written claim for such "items." Conversely, no "written claim" is required to dispute the value of any "item" for which compensation was offered. Echo 45 did not submit a written claim, but later obtained an appraisal concluding that the land's value reflected the possibility that it may be rezoned. Did the lower courts err in holding that the possibility that Echo 45's land may be rezoned was an "item" of property or damage separate and distinct from the land itself?

The trial court answered "no."

The Court of Appeals answered "no."

The Drain District answers "no."

The Owners answer "yes."

The Real Property Section answers "yes."

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I. INTRODUCTION

This case involves a published opinion from the Court of Appeals addressing a provision in the UCPA. Under the UCPA, a public or private agency that seeks to acquire property through eminent domain must begin the acquisition process by submitting a written offer to purchase the property to the property's owner. The UCPA provision involved in this case requires that the owner must review the offer to determine whether the agency has offered compensation for "items of compensable property or damage" for which the owner believes that it should be compensated. If the offer has omitted compensation for any such "items," the owner must file a "written claim" with the condemning agency. If the owner does not timely file a written claim for omitted items of property and damage, then the owner is foreclosed from seeking just compensation for any such "item." See MCL 213.55.

Here, the Drain District offered Echo 45 compensation for the land that it sought to acquire. Echo 45 did not submit a written claim notifying the Drain District that Echo 45 intended to claim compensation for any "items of property or damage" for which the Drain District had not submitted an offer, but contested the amount that the Drain District had offered for the land. Thus, Echo 45 retained an expert real estate appraiser, Daniel Essa, to determine the land's value. Among the various factors that Mr. Essa considered in determining the land's value was the possibility that the land could be rezoned for a different use. Mr. Essa concluded that the land did possess a reasonable possibility of rezoning, and his conclusion of the land's value reflected that possibility.

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After learning of Mr. Essa's conclusion, the Drain District moved to prohibit Echo 45 from presenting any evidence that the land's value reflected a reasonable possibility of rezoning. The Drain District argued that its offer for Echo 45's land did not include any value for the possibility that the land may have been rezoned, so Echo 45 was required to submit a written claim or be barred from obtaining just compensation. The trial court agreed, granting the Drain District's motion. In an opinion published at the Drain District's request, the Court of Appeals affirmed.

The lower courts' decisions that Echo 45 was required to submit a "written claim" because the value of its land reflected a reasonable possibility of rezoning are erroneous on a number of levels. Most importantly, the UCPA provides that land is "property." The possibility that land may be rezoned is not an "item" of property distinct from the land itself, but is simply one of the mulitple factors that must be taken into account to determine land's value. Effectively, the lower courts separated the possibility that land may be rezoned – one of the multiplicity of factors contributing to the land's value – from the "item" of land itself. In doing so, the lower courts transformed the UCPA's requirement that the owner must file written claims only for "items" that were omitted from the agency's offer into a requirement that the owner must file written claims relating to the methodology that the agency used to reach the amount of its offer.

The lower courts' decisions thus conflict with UCPA, but further, they undermine the condemnation process that the Legislature established in the UCPA. That process provides that condemned owners need only file "written claims" when the agency initially omits compensation for "items of property or

damage" so that the agency may then submit an offer for any such omitted "items." Once the parties are aware of all the "items" in play, they present their methodologies and conclusions of value to the factfinder, which decides the amount that equals "just compensation." By issuing a published decision requiring condemned owners to respond to condemning agencies' valuation methodologies in their "written claims," the Court of Appeals has upset Michigan's statutory condemnation process.

This Court should peremptorily reverse the Court of Appeals' erroneous decision, or at a minimum grant leave to appeal to address this important issue. The Court of Appeals' published opinion is precedential, and the UCPA governs every condemnation action filed in this State. The decision that condemned owners must respond not only to omitted "items," but also to condemning agencies' valuation methodologies in the short time provided for them to file written claims is a significant error, potentially affecting every property owner and condemning agency in Michigan. This case therefore satisfies the requirements of MCR 7.302, and this Court should peremptorily reverse the Court of Appeals or enter an order granting leave to appeal.

II. STATEMENT OF FACTS AND PROCEEDINGS

The Real Property Section generally concurs in the Statement of Material Proceedings and Facts provided in the Owners' Application for Leave to Appeal. But now that the Court of Appeals has issued a published opinion, the facts that will be known to the bench and bar as they attempt to apply the Court of Appeals opinion as precedent are limited to the facts recited in that opinion. That opinion

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was originally issued on November 3, 2005, as an unpublished per curiam, and is consistent with the character of a per curiam opinion. See Black's Law Dictionary (6th ed,) p 1136 (defining a per curiam opinion as a "brief announcement of the disposition of a case").

To understand whether a "written claim" was necessary for the Owners to seek compensation for the value of their land, the content of the Drain District's statutory offer is critical. But the Court of Appeals opinion does nothing to describe the Drain District's offer. The Drain District's offer to Echo 45 consisted of a letter from the Drain District's attorneys offering a cash payment in exchange for a deed conveying the land that the Drain District desired:

> Pursuant to the provisions of the Uniform Condemnation Procedures Act, and on behalf of the Carrier Creek Drainage District, I am authorized to make an offer of payment of $92,000.00 in exchange for your signature on the enclosed Warranty Deed. If you choose to accept this offer, please sign and return the Warranty Deed. For recording purposes, the Warranty Deed must be signed in the presence of two witnesses and a notary (the notary can serve as one of the witnesses).[1]

Deeds convey interests in land, see MCL 565.1, so the Drain District submitted an offer to Echo 45 for its land. Echo 45 did not then submit any "written claim" under MCL 213.55(3), apparently seeking to dispute only the amount offered for its land. Echo 45 subsequently obtained a real estate appraisal that concluded that Echo 45's land possessed greater value than the Drain District had offered. One factor that contributed to that value, according to Echo 45's appraiser Mr. Essa, was the possibility that the land could be rezoned for office use.[2]

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[1] See Plaintiff's Appendix to Memorandum of Law dated March 21, 2003.
[2] See Trial Transcript, Vol. IV, p 111.

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After Echo 45 provided the Drain District with a copy of its appraisal, the Drain District filed a motion arguing that the possibility that Echo 45's land could be rezoned was an "item of compensable property or damage." The Drain District argued that because its offer had not included any value attributable to the possibility that the land could be rezoned, Echo 45's failure to file a written claim prohibited Echo 45 from seeking compensation for any valuation of the land that did consider such a possibility.[3] The trial court agreed and entered an Order prohibiting Echo 45 from presenting any evidence that the value of its land reflected a reasonable possibility of rezoning.[4] Later, the Court of Appeals affirmed that decision. See 269 Mich App 324 (2005).

III. GROUNDS FOR APPEAL UNDER MCR 7.302 ARE PRESENT

This Court should grant the Owners relief either by peremptorily reversing the Court of Appeals or granting leave to appeal because this case meets the standards for this Court to grant relief under MCR 7.302. That rule provides that an application for leave must show that the issue in the case satisfies one of the following factors for this Court to grant relief:

> (1) the issue involves a substantial question as to the validity of a legislative act;
>
> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
>
> (3) the issue involves legal principles of major significance to the state's jurisprudence; [or]
>
> * * *

[3] See Plaintiff's Motion in Limine dated July 28, 2003.
[4] See Order dated September 30, 2003.

> (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals . . . . MCR 7.302(B).

This case involves a clearly erroneous Court of Appeals decision that conflicts with this Court's opinions addressing the proper means to determine market value to establish just compensation. Properly establishing constitutional "just compensation" is a significant public issue. Further, the Court of Appeals' erroneous interpretation of the UCPA calls the UCPA's validity into question. Because of the Court of Appeals error, and the error's potential widespread impact, this Court should peremptorily reverse the Court of Appeals or, at a minimum, grant leave to appeal.

A. The Issue has Significant Public Interest, and Involves a Subdivision of the State

First, the distinction between "items" of property and damage under the UCPA, and the factors that contribute to the value of any individual item, is of significant public interest. Every property in Michigan is subject to eminent domain, see Woodmere Cemetery v Highway Comm'rs, 104 Mich 595, 599; 62 NW 1010 (1895), rendering the UCPA applicable to every property in Michigan. See MCL 213.75 (providing that all condemnation actions are governed by the UCPA). Thus, every condemning agency as well as every property owner is interested in the UCPA being properly interpreted. For the reasons discussed below, the Court of Appeals' conclusion that the possibility that land may be rezoned is an "item" of property or damage distinct from the land itself upsets the process that the Legislature set forth in the UCPA, affecting every condemning agency and potentially every single property owner in Michigan. Also, this action involves a

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subdivision of the state; drainage districts are statutory entities, possessing only those powers that the Legislature grants to them. See MCL 280.461 et seq. (establishing intra-county drainage districts).

B. The Issue in this Case Involves Legal Principles of Major Significance to this State's Jurisprudence

Next, the Court of Appeals' decision blurring the distinction between "items" of property or damage under the UCPA, and the factors that contribute to those items' value, involves principles of major significance to Michigan jurisprudence. As mentioned, the UCPA requires condemned owners to file "written claims" when a condemning agency's good faith offer omits compensation for "items of compensable property or damage." MCL 213.55(3). In this case, the Drain District submitted an offer for Echo 45's land. The Legislature explicitly defined "land" as "property" under the UCPA. See MCL 213.51(i).

Yet the Court of Appeals never even mentioned the Legislature's definition of "property" in its attempt to determine whether the possibility that land can be rezoned is an "item" of property distinct from the land itself.

Instead, it attempted to treat Echo 45's land as "damage," effectively divorcing land from the inherent factors that contribute to the land's value, and worse, undermining the Legislature's definition of "property" in the UCPA. The lower courts decided this issue as if the Legislature had not defined "property" at all, let alone defined it to include "land," the very "item of property" at issue in this case. The Court of Appeals decision therefore effectively removes the fundamental definition of "property" that the Legislature set forth in the UCPA.

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A decision that undermines the Legislature's work is problematic enough, but worse, the decision here also undermines the principles that this Court employs when applying statutes. The principle that a statute's plain text is the best indicator of the Legislature's intent is too fundamental to Michigan law to require citation. But the lower courts ignored the UCPA's plain text, ignoring the Legislature's definition of "property" in favor of a judicially-created definition of "damage" that, as explained below, actually usurps the Legislature's definition of "property." This Court has emphasized the primacy of statutory text, see Wickens v Oakwood Healthcare Sys, 465 Mich 53, 60; 631 NW2d 686 (2001), and the lower courts' decisions cut sharply against the UCPA's text. Both to preserve the principles established in the UCPA, and to preserve the principle that actual text must be the starting point for applying any statute, this Court should peremptorily reverse the Court of Appeals or grant leave to appeal.

C. The Court of Appeals' Decision is Clearly Erroneous and Conflicts with This Court's Decisions

For similar reasons, the Court of Appeals plainly erred in deciding that the possibility that land may be rezoned is an "item" separate from the land itself. Land is defined as "property" under the UCPA, but the Court of Appeals ignored that definition and attempted to analyze the value of Echo 45's land as if it were "damage" distinct from the land itself. That is erroneous and allows the concept of "damage" to effectively swallow the Legislature's definition of "property" under the UCPA.

Worse, however, is that the Court of Appeals' decision conflicts with this Court's decisions explaining that the possibility that land may be rezoned is a factor

that contributes to the land's value. In a number of cases, including several recent decisions, this Court has held that the possibility that land may be rezoned for a use different than its present use is a factor that must be taken into account when determining the land's market value. See, e.g., Silver Creek Drain Dist v Extrusions Div, Inc, 468 Mich 367, 378; 663 NW2d 436 (2003) (stating that when analyzing land's value to establish just compensation, the analysis must consider "the increase in value attributable to the reasonable probability that the property would be rezoned"); Dep't of Transp v Van Elslander, 460 Mich 127, 130; 594 NW2d 841 (1999) (stating that the possibility of a zoning variance "would have affected the price which a willing buyer would have offered for the property just prior to the taking"); see also Dep't of Transp v Haggerty Corridor LP, 473 Mich 124, 136; 700 NW2d 380 (2005) (Young, J.) ("evidence demonstrating the likelihood of a zoning modification" is "just like any number of circumstances that may affect a property's value on the open market"). The Court of Appeals' decision conflicts with this Court's decisions because it treats the possibility that land may be rezoned as somehow distinct from the land itself, though the Court of Appeals should have recognized that a dispute whether land possessed a reasonable possibility of rezoning is simply a dispute over "the price which a willing buyer would have offered for the property." Van Elslander, 460 Mich at 127.

D. The Court of Appeals' Decision Casts the UCPA's Validity into Doubt

Finally, by effectively altering the UCPA to require that condemned owners must file "written claims" for the various factors that contribute to land's value, the Court of Appeals has placed the UCPA's validity in doubt. Under the Court of

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Appeals decision, the owner must identify not only "items" that were not included in the agency's offer, but also must "look behind" the agency's offer and analyze its appraisal to determine which factors contributing to the items' value, like the possibility that land may be rezoned, were accounted for in the appraisal. If the owner fails to file claims for both omitted items and factors affecting value that were not considered within 60 days, then the owner is barred from obtaining just compensation for the taking. The Court of Appeals has twisted the UCPA to impose a burden on condemned owners' fundamental right to just compensation that owners cannot meet, frustrating the Legislature's intent and undermining the UCPA's validity. To ensure that the UCPA is not subject to constitutional challenges, and to effectuate the intent that the Legislature expressed in the UCPA's text, this Court should peremptorily reverse the Court of Appeals, or at a minimum grant leave to appeal.

IV. LEGAL ANALYSIS OF THE QUESTION PRESENTED

The UCPA requires a condemned owner to submit a "written claim" when a condemning agency's "offer" does not include "items of compensable property or damage" for which the owner intends to claim a right to compensation. In holding that the possibility that land may be rezoned is an "item" separate from the land itself, the Court of Appeals ignored the UCPA's definition of "property," ignored the manner for determining land's value under Michigan law and standard appraisal principles, and ignored the meaning of "damage" in condemnation. The Court of Appeals has created burdens for condemned owners that the UCPA does not provide, creating obstacles to condemned owners obtaining their "just

compensation." These errors disrupt the condemnation process that the Legislature established in the UCPA.

A. Standard of Review

The issue in this case involves a construction of the UCPA's language requiring the landowner to file a "written claim" when the owner intends to seek compensation for "items of compensable property or damage" that were not included in the condemning agency's statutory "written offer." See MCL 213.55(1), (3). Statutory construction presents issues of law that are subject to de novo review. See Wayne County v Hathcock, 471 Mich 445, 455; 684 NW2d 765 (2004).

B. The Condemnation Process

Once a condemning agency adopts a resolution of necessity declaring that the agency desires to acquire certain property for a public use, see, e.g., MCL 213.1 (governing state agencies' resolutions of necessity), the UCPA then applies. The UCPA governs the agency's efforts to actually acquire the property. See MCL 213.52 ("This act provides the standards for the acquisition of property by an agency"). Its standards apply from the beginning of the acquisition process, including "the precondemnation negotiation process." Oakland Hills Dev Corp v Leuders Drain Dist, 212 Mich App 284, 290; 537 NW2d 258 (1995). The UCPA's first requirement is for the condemning agency to establish an estimate of the owner's just compensation.

1. The Offer

MCL 213.55(1) governs the pre-condemnation negotiation process. It requires that, before contacting an owner to acquire the owner's property, a

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condemning agency must establish an amount that it believes to be "just compensation" for the property, and offer that amount to the owner in exchange for the property:

> Before initiating negotiations for the purchase of property, the agency shall establish an amount that it believes to be just compensation for the property and promptly submit to the owner a good faith written offer to acquire the property for the full amount so established.[5]

Statutory offers are generally submitted in the form of a letter from the condemning agency to the owner, offering compensation and identifying the property that the agency desires. In this case, the Drain District submitted a letter from its attorneys to Echo 45, offering Echo 45 a cash payment in exchange for Echo 45 executing a deed to convey the land that the Drain District needed to acquire.

In any event, because the condemning agency must offer an amount of money that it believes is "just compensation," it must offer the amount that it believes would put the property owner in as good a position as it would be if its property were not taken. See, e.g., Dep't of Transp v Van Elslander, 460 Mich at 129. Thus, the condemning agency must offer the owner the amount that it believes is the market value of the land that it is taking and, depending on the acquisition, it may also be required to offer compensation for a decrease in the value of land that remains after a partial taking, see State Hwy Comm'r v Schulz,

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[5] MCL 213.55(1). The UCPA grants condemning agencies discretion in determining the means to estimate just compensation. Typically, a condemning agency will commission an appraisal to establish this amount, see, e.g., Dep't of Transp v Frankenlust Lutheran Congregation, 269 Mich App 570; __ NW2d __ (2006), but the UCPA does not require appraisals, allowing a condemning agency to otherwise establish the amount that it believes is just compensation. See MCL 213.55(1) ("The agency shall provide the owner of the property and the owner's attorney with an opportunity to review the written appraisal, if an appraisal has been prepared, or if an appraisal has not been prepared, the agency shall provide the owner or the owner's attorney with a written statement and summary, showing the basis for the amount the agency established as just compensation for the property").

370 Mich 78, 84; 120 NW2d 733 (1963), as well as compensation for items other than land including, by way of example, the going concern value of a business, see City of Detroit v Michael's Prescriptions, 143 Mich App 808, 819; 373 NW2d 219 (1985), business interruption expenses, see State Hwy Dep't v Dake Corp, 357 Mich 20, 31-32; 97 NW2d 748 (1959), lost rents, see City of Muskegon v DeVries, 59 Mich App 415, 419; 229 NW2d 479 (1975), costs incurred to avoid business interruption, see City of Detroit v Hamtramck Community Fed Credit Union, 146 Mich App 155, 158; 379 NW2d 405 (1985), and either the value of, or the costs to relocate fixtures, see Wayne County v Britton Trust, 454 Mich 608, 623; 563 NW2d 674 (1997), all of which the Michigan courts have held to be components of "just compensation" under Const 1963, art 10, §2. Only after submitting an offer of "just compensation" may the condemning agency file its complaint to take the property through eminent domain. See MCL 213.55(1).

2. The "Written Claim" Requirement

Once the condemning agency files its complaint, the UCPA requires the owner to review the written offer to determine whether the offer does not include compensation for "items of compensable property or damage" for which the owner intends to seek compensation:

> If an owner believes that the good faith written offer made under subsection (1) did not include or fully include 1 or more items of compensable property or damage for which the owner intends to claim a right to just compensation, the owner shall, for each such item, file a written claim with the agency. The owner's written claim shall provide sufficient information and detail to enable the agency to evaluate the validity of the claim and to determine its value. The owner shall file all such claims within 90 days after the good faith offer is made pursuant to section 5(1) or 60 days after the complaint

> is filed, whichever is later. . . If an owner fails to file a timely written claim under this subsection, the claim is barred. MCL 213.55(3).

For example, if a condemning agency offers an owner compensation for the land that the agency is taking, but the owner believes that it is also entitled to compensation for business interruption damages, then within 60 days after the agency files its complaint, the owner must submit a written claim advising the agency of the damage and providing the agency with "sufficient information and detail" for the agency itself to evaluate the business interruption damage and determine its value. See City of Novi v Woodson, 251 Mich App 614, 624; 651 NW2d 448 (2002) (barring business interruption damages when the owner failed to submit a proper written claim for that item). After receiving the owner's written claim, the agency possesses the option to "submit a good faith written offer for the item of property or damage." Thus, the agency may amend its good faith offer to address "items of property or damage" that were not included in the agency's initial offer. See MCL 213.55(3).

On the other hand, if the owner intends to seek compensation only for "items of compensable property or damage" for which the agency did submit a good faith written offer, the UCPA imposes no obligation on the owner to file any claim, and the agency receives no opportunity to amend its offer. Instead, the action proceeds to a trial in which the factfinder must "ascertain and determine just compensation to be made for the acquisition of the described property." MCL 213.55(1); see also MCL 213.62 ("plaintiff or defendant may demand a trial by jury as to just compensation").

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MCL 213.55(3)'s design ensures that condemning agencies and condemned owners are equally aware of the "items of compensable property or damage" that are in dispute in order to limit condemning agencies' exposure to statutory fee reimbursement. Under the UCPA, a condemning agency may be required to reimburse an owner's attorney fees up to one-third of the amount by which the final just compensation award exceeds the condemning agency's good faith written offer. See MCL 213.66(3); see also Dep't of Transp v Randolph, 461 Mich 757, 765-66; 610 NW2d 893 (2000) (describing the reimbursement process). Therefore, if an owner seeks and obtains compensation for an item of property or damage for which the agency did not submit an offer, then the baseline for fee reimbursement for that item is zero. That exposes the agency to liability for fee reimbursement on a full one-third of the compensation award.[6] MCL 213.55(3) provides condemning agencies an opportunity to avoid the zero baseline and accordant liability for fee reimbursement by requiring owners to advise condemning agencies that the owners intend to seek compensation for an item for which the agency has not submitted an offer. Once an agency receives the owner's claim, the UCPA provides the agency with an opportunity to amend its offer to address that item, or at least confront the owner's claim for the item having made a conscious decision not to submit an offer. See MCL 213.55(1) ("After receiving a written claim from an owner, the agency may provide written notice that it contests the compensability of

[6] The facts in City of Novi v Woodson illustrate this point. There, the City had submitted an offer for the owner's land, but did not submit an offer for business interruption damages. The owner sought compensation for business interruption damages. See 251 Mich App at 624. Had the owner been awarded such damages, the owner could have sought reimbursement for attorney fees equaling (1) one-third of any increase over the amount that the City had offered for the owner's land, as well as (2) one-third of the entire business interruption damage award. See MCL 213.66(3).

the claim, establish an amount that it believes to be just compensation for the item of property or damage, or reject the claim"). If the agency chooses to submit an offer for that item, MCL 213.55(3) provides that the "sum of the good faith written offer for all such items of property or damage plus the original good faith written offer constitutes the good faith written offer for purposes of determining the maximum reimbursable attorney fees under" MCL 213.66(3).

In this case, the Drain District offered Echo 45 compensation for the land that the Drain District was taking. Echo 45 disputed the amount that the Drain District had offered for its land, but apparently did not intend to claim compensation for any "items" that were not included in the offer like going concern, business interruption damages, or fixtures. The lower courts' conclusions that the possibility that Echo 45's land could be rezoned for a different use was an "item of property or damage" separate from the land itself, ignores the UCPA's express terms, Michigan law's definitions of "market value," and years of condemnation law into which the "written claim" requirement was integrated.

a. "Land" is an Item of Property

In this case, the Drain District submitted a statutory offer to purchase Echo 45's land, which is defined as "property" under the UCPA:

> "Property" means **land**, buildings, structures, tenements, hereditaments, easements, tangible and intangible property, and property rights whether real, personal, or mixed, including fluid mineral and gas rights. MCL 213.51(i) (emphasis added).

Thus, an "item of property" could be any of the items identified in the UCPA's definition of "property," including "land." Echo 45 had no burden to file a "written claim" under MCL 213.55(3) for its land because the Drain District submitted an

offer of just compensation for that "item of property." Importantly, the Drain District's offer was statutorily required to be in the "amount that it believe[d] to be just compensation," MCL 213.55(1), which of course means the amount that the Drain District believed equaled the land's "market value." See Dep't of Transp v Van Elslander, 460 Mich at 129.

b. Land's Market Value Inherently Reflects the Possibility that the Land May be Rezoned

Fundamentally, land's market value inherently includes any possibility that land may be rezoned for a use different than its current use. Michigan law's definition of "market value" provides that the value of land inherently reflects all the land's potential uses:

> The market value of land or real estate is the highest price estimated in terms of money that the land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all of the uses and purposes to which it is adapted and for which it is capable of being used. Consumers Power Co v Allegan State Bank, 20 Mich App 720, 744-45; 174 NW2d 578 (1970) (internal quotation omitted).

In Silver Creek Drain Dist v Extrusions Div, Inc, 468 Mich at 378, in which this Court addressed the factors accounted for when determining land's "market value," this Court reiterated that the value of land inherently reflects the land's "capacity for any and all uses," including possibility of rezoning.

Indeed, both Michigan law and basic appraisal principles provide that land's "capacity for any and all uses" is established by determining the land's highest and best use. See, e.g., City of St Clair Shores v Conley, 350 Mich 458, 462; 86 NW2d 271 (1957). "Highest and best use" means "the most profitable and advantageous use the owner may make of the property even if the property is presently used for a

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different purpose or is vacant, so long as there is a market demand for such use." Detroit/Wayne County Stadium Auth v Drinkwater, Taylor & Merrill, Inc, 267 Mich App 625, 633; 705 NW2d 549 (2005) (internal quotation omitted). Land must be valued at its highest and best use in every context, not just in eminent domain. For example, this Court held in a property tax case that "'Highest and best use' is a concept fundamental to the determination of true cash value. It recognizes that the use to which a prospective buyer would put the property will influence the price which the buyer would be willing to pay." Edward Rose Bldg Co v Independence Twp, 436 Mich 620, 633; 462 NW2d 325 (1990); see also Dep't of Transp v Haggerty Corridor LP, 473 Mich at 127 (Young, J.) (applying Edward Rose in an eminent domain action). Indeed, determining land's highest and best use "can be described as the foundation on which market value rests." The Appraisal Inst, The Appraisal of Real Estate (Chicago: The Appraisal Institute, 12th ed, 2001), p 305.

Whether land may be rezoned is a factor that must be taken into account in determining land's highest and best use and therefore its market value. This Court confirmed this over forty years ago in State Hwy Comm'r v Eilender, 362 Mich 697; 108 NW2d 755 (1961). There, land was being taken for a road project. The condemning agency argued that the land would be used for residential purposes under its existing zoning, and valued it as residential land. See id. at 698. On the other hand, the property owners assumed that a pending rezoning of the land for commercial use would be approved, and valued the land as if it were available for commercial use. See id. at 699. This Court explained that the land should not be valued strictly as residential land, or as land already approved for commercial use;

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however, the possibility that the land could be rezoned for commercial use had to be taken into account in determining the land's value:

> If the land is [at the time of taking] zoned so as to exclude more lucrative uses, such use is ordinarily immaterial in arriving at just compensation. But, on the other hand, it has been held, "if there is a reasonable possibility that the zoning classification will be changed, **this possibility should be considered in arriving at the proper value**. This element, too, must be considered in terms of the extent to which the 'possibility' would have **affected the price which a willing buyer would have offered for the property just prior to the taking.**" Id. (emphasis added), quoting United States v Meadow Brook Club, 259 F2d 41, 45 (CA 2, 1958).

More recently, this Court again confirmed that the possibility of a zoning change affects land's inherent value. In Dep't of Transp v Van Elslander, the trial court refused to admit evidence that a zoning variance might be obtained to remedy the taking's effect on the portion of the property remaining after a partial taking. But this Court held that evidence of a possible zoning variance was relevant because such evidence "would have affected **the price which a willing buyer would have offered for the property** just prior to the taking." 460 Mich at 130 (emphasis added; internal quotation omitted). Even more recently, this Court held that when determining market value to establish just compensation, "the value of land must include every . . . element entering into its cash or market value, as tested by its capacity for any and all uses." Silver Creek, 468 Mich at 378. Land's market value would inherently account for the possibility that the land could be rezoned: "any and all uses," of course, include the possibility that land could be rezoned for a use different than its present use.

Because the possibility that land can be rezoned is one factor that must be considered in determining the market value of land, the possibility that land could

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be rezoned is not an "item" of property separate from the land itself. It is simply one factor among "all the multiplicity of factors that go into making up value." See Silver Creek, 468 Mich at 377. Thus, any disagreement whether Echo 45's land possessed a reasonable possibility of rezoning was not a dispute over an "item" separate from the land, but was a dispute over the value of the land itself.[7] To summarize, the Drain District submitted an offer for Echo 45's land. The UCPA required that offer to be in the amount that the Drain District "believe[d] to be just compensation" for the land. MCL 213.55(1). "Just compensation" for land equals the land's market value, see Van Elslander, 460 Mich at 129, and "market value" means the highest price that a buyer and seller would accept. See Drinkwater, 267 Mich App at 633; see also Silver Creek, 468 Mich at 377. Established law makes clear that the price that a buyer and seller would accept for land reflects the possibility that the land may be rezoned. See Van Elslander, 460 Mich at 129. So when the Drain District offered Echo 45 "just compensation" for Echo 45's land, it offered the highest price that it believed a buyer and seller would accept for that land. The possibility that Echo 45's land could be rezoned – a factor that affects the land's market value – cannot be carved out of the land and transformed into some "item" separate from the land itself. Instead, once the Drain District

[7] MCL 213.55(3) provides that owners must file a written claim when the agency's offer did not "include or fully include" an item of property or damage. This Court should not be persuaded by an argument that the "fully include" language somehow refers to the value of the "item." That language simply refers to whether a condemning agency's offer includes compensation for the entire "item" for which the owner intends to seek compensation. For example, a condemning agency's offer may have included compensation for the portion of land in a parcel that the agency is taking, while the owner intends to seek compensation for the entire parcel of land because the taking "would destroy the practical value or utility of the remainder of that parcel." MCL 213.54(1). In such a circumstance, the agency's offer would have included land only "in part," so the owner would be required to submit a written claim advising the agency that the owner intended to seek compensation for the entire parcel of land. But that has nothing to do with the value of the item of land.

submitted its offer for Echo 45's land, the dispute was simply whether the amount that the Drain District had offered as just compensation for that land was correct.

The Oakland County Circuit Court's Opinion and Order in City of Troy v Premium Construction, LLC, Feb. 3, 2006 (Docket No 01-035191-CC), provides an example of the proper analysis under MCL 213.55(3). There, the City was taking Premium Construction's land to build a park, and Premium Construction contended that the amount of the City's offer was inadequate. Thus, the issue before the circuit court was the market value of Premium Construction's land, which would provide the basis for just compensation. The City had concluded that a portion of the land was regulated wetlands, limiting its development potential. On the other hand, Premium Construction's appraiser concluded that notwithstanding any regulations, the land would be available for development. Therefore, he valued the land as if it were so available. The parties' disagreement over whether the alleged wetland could be developed prompted the City to argue that its statutory offer was based on a valuation of the land as regulated, so Premium Construction was required to submit a "written claim" under MCL 213.55(3) for the possibility that the alleged wetland area could be developed. See Slip op, p 5, attached as Exhibit A.

After reviewing MCL 213.55(3), the Oakland County Circuit Court properly rejected the City's argument, holding that whether the land was regulated or unregulated, and therefore whether it was developable, was merely a valuation issue. Because the City had offered compensation for land, no "written claim" was necessary:

> Plaintiff's offer in this case did include compensation for the value of property. The dispute over the existence of regulated wetlands is not

> a separate compensable property or type of damages about which Defendant would have to notify Plaintiff in writing. Rather, it is a factor in the parties' dispute over the fair market value of the property. The Court concludes that Defendant's assertion that the wetlands are not subject to regulation is not barred by the limitations period of MCL 213.55(3). Slip op at 7, Exhibit A.

Likewise, the dispute over whether Echo 45's land possessed a reasonable possibility of rezoning related only to the value of the land. The Drain District submitted an offer for Echo 45's land; Echo 45 came to a different conclusion of the land's value because its appraiser, unlike the Drain District's appraiser, believed that the land's highest and best use involved the possibility of rezoning. No "written claim" was necessary for Echo 45 to dispute the Drain District's conclusion of the land's value, so the lower courts erred in holding that MCL 213.55(3) barred Echo 45 from disputing the value because it had not submitted a written claim. This Court should therefore peremptorily reverse the Court of Appeals, or at a minimum grant leave to appeal to address this issue.

c. An Owner Only Must Submit a Written Claim When an Item is Not Included in the Agency's "Offer," Regardless of the Content of the Agency's "Appraisal"

Both the Court of Appeals and the Drain District have argued as if MCL 213.55(3) requires condemned owners to review and respond to every detail of the agency's appraisal in order to file a "written claim." See 269 Mich App at __. Under the UCPA, a condemning agency possesses the option to obtain an appraisal to establish the amount to submit as its "good faith written offer" for compensation for the property that it desires. See MCL 213.55(1); note 5, supra. Importantly, however, the UCPA does not require the owner to analyze the methodology employed in the appraisal in order to file the owner's "written claims"

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for omitted items of property or damage. See MCL 213.55(3). Contrary to the Court of Appeals and the Drain District's arguments, the UCPA requires the owner to identify only items that were not included in the agency's written offer:

> If an owner believes that the **good faith written offer** made under subsection (1) did not include or fully include 1 or more items of compensable property or damage for which the owner intends to claim a right to just compensation, the owner shall, for each such item, file a written claim with the agency. MCL 213.55(3) (emphasis added).

Thus, the owner must review the "written offer." If the owner concludes that the agency has omitted from the offer "items" for which the owner intends to claim compensation, it must file written claims for those "items."

While the good faith written offer communicates the agency's "offer to acquire the property," MCL 213.55(1), the appraisal analyzes the "value" of property. The UCPA defines the term "appraisal" to mean "an expert opinion of the **value** of property taken or damaged, or other expert opinion pertaining to the amount of just compensation." MCL 213.51(d) (emphasis added). MCL 213.55(3) does not require a condemned owner to file a claim if the owner merely disagrees with the condemning agency's opinion of value for the item of property that the agency is taking. In other words, the UCPA does not require a condemned owner to submit a written claim in response to the condemning agency appraiser's analysis of "all the multiplicity of factors that go into making up value." See Silver Creek, 468 Mich at 377. Disputes over value and the amount of compensation due are for the factfinder. See MCL 213.55(1) (the court must "ascertain and determine just compensation"); see also MCL 213.63 ("The jury or court shall award in its verdict just compensation"). MCL 213.55(3) only requires a written claim when an

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"item" of property or damage has been omitted from the "good faith written offer" altogether.

In light of this, the Drain District's argument that a written claim was necessary because its "good faith offer did not include damages based on **valuation of the property** assuming a change in zoning," is wrong. Appellee's Response in Opposition, p 12-13 (emphasis added). The Drain District's "valuation" is contained only in the Drain District's appraisal. MCL 213.55(3) does not require an owner to review the agency's appraisal to file a written claim; in fact MCL 213.55(3) does not reference any party's appraisal at all. Rather, the owner must examine only the written offer to determine the "items" for which an offer was submitted. There does not seem to be any dispute that the "item" for which the Drain District submitted an offer was Echo 45's land. Echo 45 had no obligation to "look behind" the offer, examine the valuation methodology applied in the Drain District's appraisal, and then file a written claim disputing that methodology. The Drain District's argument, and the lower courts' decisions, make sense only by substituting the term "appraisal" for the term "written offer" in MCL 213.55(3). Of course, courts cannot construe statutes in a manner that substitutes one term for another. See Robertson v DaimlerChrysler Corp, 465 Mich 732, 759; 641 NW2d 567 (2002).

d. The Possibility that Land May be Rezoned is Not an "Item of Damage" Under MCL 213.55(3)

Neither the Court of Appeals nor the Drain District have applied the UCPA's definition of "property" in their attempts to analyze the possibility that Echo 45's land could have been rezoned. Instead, they have argued that the possibility of

rezoning is "compensable damage" for which a written claim was due under MCL 213.55(3). The Court of Appeals purported to apply a plain language approach to the issue:

> The plain and ordinary meaning of "compensable damage" is loss, harm, or injury which is eligible for compensation. Here, Echo is claiming that a willing buyer would have purchased this residentially zoned property for a professional office use and, thus, it was deprived of the increased value associated with that possible zoning change as a consequence of the taking. So, Echo intended to claim a right to just compensation for the loss of value of the possibility of rezoning as a consequence of the taking, which was not included in the good faith offer. Thus it is clearly a claim for compensable damage that was required, under MCL 213.55(3), to be disclosed within the time limits set forth in the statute. 269 Mich App at __.

The Court of Appeals' purported plain language approach commits significant errors, upends the UCPA's structure and conflicts with established principles for interpreting statutory language that demonstrate the correct meaning of "items of compensable damage."

(i). The Court of Appeals Misapplied the Language of MCL 213.55(3), Creating Conflicts with Other UCPA Provisions

First, the Court of Appeals purported to focus on "compensable damage" even though the UCPA requires written claims for "**items** of compensable property or damage." MCL 213.55(3) requires a property owner to submit written claims if the owner "believes that the good faith offer made under subsection (1) did not include or fully include 1 or more **items** of compensable property or damage for which the owner intends to claim a right to just compensation."[8] Thus, the duty is

[8] Id. (emphasis added). Notably, after introducing the concept as "items of compensable property or damage," the UCPA goes on to refer to "items of property or damage." See MCL 213.55(3). Apparently, once the Legislature established that it intended to refer to "items of compensable property or damage," it then used "items of property or damage" as a type of shorthand to refer to the same items. Compare Charboneau v Beverly Enterprises, Inc, 244 Mich App 33, 42; 625 NW2d 75 (2000) (explaining that "legislative shorthand" does not change a phrase's meaning).

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not to advise the condemning agency that it has omitted "compensable damage" from its good faith offer, but (putting items of property aside) that it has omitted an "item" of damage. MCL 213.55(3)'s prepositional phrase "of compensable property or damage" includes compound objects, property and damage, phrased alternatively by the term "or." See Warriner's English Grammar and Composition (New York: Harcourt Brace Jovanovich, 1977), p 79-80. This entire prepositional phrase functions as an adjective, modifying the word "item." See id., p 81; see also Stanton v City of Battle Creek, 466 Mich 611, 616; 647 NW2d 508 (2002) (a modifying clause in a statute modifies the last antecedent before the modifying clause). Notably, MCL 213.55(3) consistently refers to "items of property or damage," while the UCPA never refers to "compensable damages" at all. See MCL 213.51 et seq. So owners have only a duty to file written claims when a condemning agency's offer omits an "item," not just some "compensable damage." In this respect, the Court of Appeals actually ignored the UCPA's language in favor of the court's own language.

By using the term "**items** of property or damage," the Legislature referred to distinct items of property and damage that may have been omitted from a condemning agency's offer. Upon receiving a "written claim" for such an item, the Legislature allowed agencies to submit offers for these distinct items and avoid the possibility of zero-baseline reimbursement. But the Court of Appeals' mistaken and overbroad reading of "compensable damage" eliminates the distinction between items. Under the Court of Appeals' "compensable damage" analysis, there is no distinction between an "item" of property and the property's value. After all, if

"compensable damage" refers generally to "loss, harm, or injury which is eligible for compensation," then owners would be required to file written claims under MCL 213.55(3) disputing even the amount of a condemning agency's offer.

In any eminent domain action, the owner is entitled to "the full monetary equivalent of the property taken." Van Elslander, 460 Mich at 129. Thus, the "full monetary equivalent of the property taken" is "loss, harm, or injury which is eligible for compensation." Applying the Court of Appeals' interpretation of "compensable damage," an owner would be required to file a "written claim" not only for "items" that were not included in an offer, but also for the value of an item for which an offer was submitted if the owner concluded that the amount of the agency's offer did not equal the item's "full monetary equivalent." That conflicts with the UCPA, which provides that an owner's written claim need only provide sufficient information for the condemning agency to reach its own conclusion of value for the item identified in the claim.[9]

Essentially, the Court of Appeals decision requires an owner to submit its appraisal as a written claim in order to ensure the owner's right to contest the amount of the agency's offer. Under the UCPA, it is the parties' appraisals that provide opinions relating to the value of property taken. See MCL 213.51(d). "Written claims" are distinct, and need only provide information to allow the agency to form its own opinion of value. If owners must submit written claims for all

[9] See MCL 213.55(3) ("The owner's written claim shall provide sufficient information and detail to enable the agency to evaluate the validity of the claim and determine its value"). Also, MCL 213.55(3)'s "in whole or in part" language refers to "items" of damage. So an owner is required to submit a written claim only when an "item" of damage was omitted in part, not when the owner merely disagrees with the amount offered as compensation for an item of damage. See also note 5, supra.

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"compensable damage" omitted from an offer, then owners must have a complete opinion of the value of the taken property within 60 days after the condemning agency files its condemnation complaint in order to satisfy the "written claim" requirement. That creates another conflict with the UCPA: MCL 213.61 governs appraisal exchanges, and allows trial courts to enter orders to facilitate production of "the owner's appraisal report," without any 60-day restriction. MCL 213.61(3). By disregarding that MCL 213.55(3) requires written claims only for omitted "items" of damage, and by replacing the statutory language with the phrase "compensable damage," which extends to any "loss, harm, or injury," the Court of Appeals has undermined the UCPA's essential structure.

(ii). Items of Compensable Damage Include Condemnation Damages that are Distinct from Items of Property

The Court of Appeals focus on the phrase "compensable damage," instead of "items" of compensable damage, frustrated its plain language analysis. That court's mistaken analysis and attempt to apply a dictionary-like definition of "compensable damage" – notably, the Court of Appeals never cited any authority for its definition – swept away the Legislature's distinction between "items" of property and "items" of damage that may be compensable in a condemnation action. Instead, the Court of Appeals should have focused on those items of damage that are compensable in eminent domain, yet are distinct from items of "property" as the UCPA defines that term. This Court recently explained in Haliw v City of Sterling Heights, 471 Mich 700, 706; 691 NW2d 753 (2005), that statutory language is properly interpreted in light of the surrounding body of law into which the language must be integrated. The pertinent language in MCL 213.55(3) was

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adopted as an amendment to the UCPA in 1996, see 1996 PA 474, and must be integrated into the body of Michigan condemnation law. To do so, the Court of Appeals should have first distinguished items of damage from items of "property," a defined term under the UCPA, and then determined which items of damage are compensable in eminent domain. Had the Court of Appeals engaged in a proper analysis, it would have concluded that "items of compensable damage" in condemnation law refers to those kinds of damage that are distinct from "property," but are compensable when property is taken through eminent domain.

A number of items of damage, distinct from property, may be compensable in a condemnation action, including examples such as business interruption damage, see Dake Corp, 357 Mich at 31-32, lost rents, see DeVries, 59 Mich App at 419, the costs incurred to avoid business interruption, see Hamtramck Credit Union, 146 Mich App at 158, and the costs to relocate fixtures, see Britton Trust, 454 Mich at 623. All these items of damage have been held to be part of "just compensation," but none fall within the UCPA's definition of "property." The Legislature was presumed to have knowledge of the decisions granting just compensation for such items of damage when it amended the UCPA, see City of Kalamazoo v KTS Indus, Inc, 263 Mich App 23, 34; 687 NW2d 319 (2004), and the language that the Legislature added to the UCPA in 1996 requiring claims for "items" of damage must be integrated into that body of law. See Haliw, 471 Mich at 706; see also Hathcock, 471 Mich at 470.

The Court of Appeals erred by characterizing the increment in the value of Echo 45's land attributable to the land's possibility of rezoning as "compensable

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damage," because "items of compensable damage" should have been integrated into Michigan condemnation law to refer to items of damage available in condemnation, which are distinct from items of property.

(iii) Summary

In sum, the Court of Appeals erred in a number of ways by characterizing the possibility that Echo 45's land could be rezoned as "compensable damages" under MCL 213.55(3). Echo 45's land is "property" as the UCPA defines that term, so the Court of Appeals erred by treating a portion of that "property's" value as "damage." Had the Court of Appeals treated Echo 45's land as "property," it would have recognized that the dispute in this case is merely a dispute over value. But further, the Court of Appeals erred in attempting to apply a dictionary-like definition in a situation where the Legislature's intent is clear upon applying the basic principles that this Court uses to discern legislative intent. By attempting to apply a dictionary-like definition instead, the Court of Appeals eliminated the Legislature's distinctions between items of property and items of damage, and transformed the owner's duty to provide a written claim that identifies "items" and allows condemning agencies to reach their own conclusions of value into a requirement that owners must identify all "loss, harm, or injury which is eligible for compensation." That is contrary to the UCPA, and this Court should therefore issue an opinion peremptorily reversing the Court of Appeals, or, alternatively, grant leave to appeal to address this issue.

3. The Appraisals

In any event, once the parties have identified the pertinent "items of property or damage," either because the parties acknowledged the items or through

submission of "written claims," the next step is for the owner to obtain an appraisal estimating the amount that will equal "just compensation." Frequently, the agency will also obtain an "updated" appraisal. See MCL 213.61(3). The UCPA and other Michigan law govern the appraisals' content, and the UCPA vests the trial court and the parties themselves with the ability to control appraisal scheduling. Both the appraisal content requirements, and the UCPA's scheduling provisions, further demonstrate that matters of valuation, including whether the possibility of rezoning may have affected the price that a buyer and seller would agree upon for land, are properly addressed in an appraisal and not the condemned owner's "written claim."

a. The Appraisal Reports Describe the "Methodology and Basis" for the Valuation of Land

Under both the UCPA and other Michigan law, it is the appraisal that addresses the value of land. The UCPA defines "appraisal" to mean "an expert opinion of the value of property taken or damaged, or other expert opinion pertaining to the amount of just compensation." MCL 213.51(d). Because an appraisal may pertain to the value of "property," or otherwise provide an opinion of the amount that equals "just compensation," the UCPA permits "appraisals" that address both items of property and items of damage. When an appraisal addresses the value of property, which the UCPA defines to include "land," the provisions of the Michigan Occupational Code applying to real estate appraisals will also apply. Under the Occupational Code, an appraisal must provide an "opinion of value of adequately described real property as of a specific date and be supported by the presentation and analysis of relevant market information." MCL 339.2609.

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Moreover, the UCPA provides that any appraisal provided pursuant to a scheduling order in a condemnation action must "fairly and reasonably describe the methodology and basis for the amount" that the appraisal concludes equals the land's value. MCL 213.61(2). As discussed, one component of the methodology for estimating the value of land is determining the land's highest and best use. The highest and best use of land "will influence the price which the buyer would be willing to pay" for the land, Dep't of Transp v Haggerty Corridor LP, 473 Mich at 127 (Young, J.), and is determined by ascertaining the use of land "that is physically possible, legally permissible, appropriately supported, financially feasible, and that results in the highest value." The Appraisal of Real Estate, supra at 305 (describing highest and best use "as the foundation on which market value rests"). In analyzing the uses of land that are legally permissible, the appraiser must analyze the possibility that the land may be rezoned:

> Frequently the appraiser must consider whether there is a reasonable probability that the zoning could be changed in order for the highest and best use of the property to be realized. . . [I]f the zoning is not appropriate for the subject site, or if a more appropriate highest and best use could be obtained with a zoning change, then the possibility of a change in zoning should be considered. Id. at 311-12.

"All appraisal reports should contain statements that describe the appraiser's analyses and conclusions pertaining to the highest and best use of the land" being appraised. Id. at 319.

Because land's value depends on its highest and best use, which accounts for the possibility of rezoning, the possibility that land may be rezoned is a valuation issue that is properly addressed in an appraisal. In fact, Michigan law requires that an appraiser must address the possibility that land may be rezoned in

completing an appraisal of that land. The Occupational Code requires real estate appraisers to comply with the standards issued by The Appraisal Foundation in The Uniform Standards of Professional Appraisal Practice ("USPAP"). See MCL 339.2609; see also AACS R 339.23101(1). In turn, USPAP requires that whenever an appraiser is appraising land, the appraiser must account for the possibility that the land's zoning may be changed when developing an opinion of the land's highest and best use:

> When the value opinion to be developed is market value . . . an appraiser must:
>
> (a) **identify and analyze the effect on use and value of existing land use regulations, reasonably probable modifications of such land use regulations**, economic supply and demand, the physical adaptability of the real estate, and market area trends; and
>
> (b) develop an opinion of the highest and best use of the real estate.[10]

Thus, under Michigan law, whether land may be rezoned is a factor that the appraiser must consider in determining the land's highest and best use. This is part of the "methodology and basis" for appraising the land's value. See MCL 213.61. Critically, the Legislature added the requirement that condemnation appraisal reports must describe their "methodology and basis" as part of the same amendatory act that added the "written claims" requirement into the UCPA. See 1996 PA 474. This further demonstrates that the Legislature distinguished between "written claims" relating to "items of property and damage" that were omitted from a condemning agency's statutory offer, and "appraisals" that explain

[10] The Appraisal Foundation, USPAP (Washington, D.C.: The Appraisal Foundation, 2005 ed, 2005), Standards Rule 1-3. USPAP is available online at http://www.appraisalfoundation.org.

the "methodology and basis" underlying the amount of damage or the valuation of property.

Because "land" is an item of property, whether land may or may not be rezoned is simply one of "the multiplicity of factors that go into making up value" for that item. Silver Creek, 468 Mich at 377. So a dispute over whether land may or may not be rezoned is, as the Owners argue, a difference of opinion between appraisers, and is not a dispute over an "item" for which a written claim is required.

b. The UCPA's Scheduling Provisions Demonstrate the Differences Between Appraisals and "Written Claims"

Additionally, the UCPA's scheduling provisions demonstrate that an appraisal should contain matters that require expert analysis, while "written claims" need only identify "items" and provide information sufficient for the condemning agency to conduct its own expert analysis. Under the UCPA, trial courts possess discretion to enter "scheduling order[s] to assure that the appraisal reports are exchanged and the parties are afforded a reasonable opportunity for discovery before a case is submitted to mediation, alternative dispute resolution, or trial." MCL 213.61(1). The UCPA contains no deadline by which appraisals must be exchanged. See MCL 213.51 et seq. This provides trial courts with flexibility to consult with the parties and account for the complexity of the issues surrounding the subject property when scheduling the amount of time the parties will have to prepare appraisals and to conduct discovery after appraisals are submitted.

On the other hand, MCL 213.55(3) provides an expedited timeline in which condemned owners must submit "written claims" identifying "items of property or damage" that were omitted from the condemning agency's offer. While that section

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allows a trial court to grant an extension in limited circumstances, it generally provides that all "written claims" must be submitted within 60 days after the agency files its condemnation complaint.

These distinctions in the UCPA's scheduling provisions further demonstrate the differences between MCL 213.55(3) "written claims" and appraisals that address issues of valuation. The written claim must only identify items of property or damage that were not included in an agency's offer. Generally, an owner will be familiar with its property and the kind of damage that the owner may suffer as the result of a taking. Therefore, the owner will be able to advise the agency of items that were omitted in a relatively brief period of time.

Valuation issues that are addressed in appraisals, however, are scheduled under the trial court's discretion. This allows trial courts to provide ample time for a party or its appraiser to investigate all the multiplicity of factors that go into making up value, see MCL 213.61(1) ("the court shall issue a scheduling order to assure that the appraisal reports are exchanged and the parties are afforded a reasonable opportunity for discovery"), including investigation of the possibility that a property may be rezoned for a different use. Contrary to the Drain District's argument, whether a property possesses a reasonable possibility of rezoning does not depend strictly on facts that would be within the owner's knowledge, such as whether a rezoning application is pending. Rather, the possibility that land may be rezoned depends on a variety of factors that an expert appraiser must investigate:

> In investigating the reasonable probability of a zoning change, the appraiser must consider trends in the market area and the history of zoning requests in the area as well as documents such as a community's comprehensive master plan. . . For example, consider a

> site zoned single-family residential in a transitional neighborhood where the zoning on several similar sites has been changed recently to commercial. Also, the city's comprehensive plan designates the property as a future commercial corridor. Both these factors may support an appraiser's conclusion that there is a reasonable probability of rezoning the subject site for commercial use. . . . Even if there is no current market evidence of a zoning change, documented interviews with officials and discussion of zoninig practices and histories can be helpful in evaluating the possibility of a zoning change. The Appraisal of Real Estate, supra p 311.

Literally, this is the textbook standard for evaluating the market value of land. "Just compensation" for land equals the land's market value, see Silver Creek, 468 Mich at 377, and nothing in Michigan law suggests that owners must meet some more stringent standard to demonstrate that their land possesses a reasonable possibility of rezoning. See State Hwy Comm'r v Eilender, supra; Dep't of Transp v Van Elslander, supra; Dep't of Transp v Haggerty Corridor, LP, supra. But the analysis of whether rezoning is possible requires a level of detail that must be addressed by an expert real estate appraiser, further demonstrating that the Legislature did not intend that owners should have to submit information relating to the value of land, and whether land may be rezoned, as part of the owner's "written claim" due shortly after the owner receives a condemnation complaint.

4. Trial

After the parties exchange appraisals and complete discovery, condemnation actions proceed to trial in the same manner as other civil actions. See MCL 213.62(1) ("plaintiff or defendant may demand a trial by jury as to the issue of just compensation pursuant to applicable law and court rules"); see also MCL 213.52(1) ("All laws and court rules applicable to civil actions shall apply to condemnation proceedings except as otherwise provided"). As this Court has

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acknowledged, a trial to determine the just compensation for a taking generally is a "battle of experts" between the parties' real estate appraisers. See Wayne County Rd Comm'n v GLS LeasCo, Inc, 394 Mich 126, 132; 229 NW2d 797 (1975). Thus, the factfinder typically determines just compensation by deciding which party's real estate appraiser has more accurately determined the market value of the taken land. To do so, the factfinder will analyze which appraiser has more convincingly accounted for "all the multiplicity of factors that go into making up value." See Silver Creek, 468 Mich at 377. If one party's real estate appraiser determined that the land possessed a possibility of rezoning, and the other party's appraiser did not, they will have different conclusion of the land's value. Whom to believe is a question for the factfinder.

In this case, however, the lower courts have transformed a dispute over the value of land that should have been for the factfinder into a dispute over the "items" for which the Drain District submitted an offer in the first place. The possibility that land can be rezoned is simply one of "the multiplicity of factors that go into making up value," and cannot be separated into an "item" of property distinct from the land itself. It is also not an "item of damage," which does not have the same meaning as an "item of property," but instead refers to other types of damage for which just compensation is available. By concluding in a per curiam that the possibility that land can be rezoned is an "item" distinct from the land itself, the Court of Appeals has undermined the condemnation process established in the UCPA and denied Echo 45 its right to seek constitutional just compensation.

C. The Constitutional Issue

While the Court of Appeals erroneous application of the UCPA is problem enough, that court has also set the UCPA on a path toward constitutional infirmity. Under the Court of Appeals' analysis, condemned owners must file written claims not only when items of property or damage are not included in an agency's offer, but also when the agency's offer is not built on an appraisal that analyzes one of the multiplicity of factor that contributes to the value of land. In this case, the factor was the possibility of rezoning. But nothing in the Court of Appeals' analysis provides any limit on the factors that must be identified. Now that the Court of Appeals' opinion is published, trial courts will attempt to apply that analysis in other condemnation actions. Therefore, trial courts will be reviewing condemning agency offers to determine whether the offers included value for the possibility of rezoning, but can extend that analysis to other factors affecting value. Indeed, nothing in the Court of Appeals opinion suggests that the same analysis should not apply to something as fundamental to value as location: if a condemned owner believes that its land has significant value due to the land's location, while the condemning agency submits an offer that reflects the agency's belief that the land's location is not favorable, under the Court of Appeals' analysis the owner apparently would be required to submit a "written claim" under MCL 213.55(3) to preserve its ability to dispute the amount that the agency offered as compensation. If the owner failed to submit a written claim, then it would be "barred" from seeking compensation based on its opinion of the land's value. MCL 213.55(3).

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This "reasoning" has placed the written claim requirement and the UCPA on a slippery slope toward unconstitutionality. Under both Const 1963, art 10, §2, as well as US Const, amend V, condemned owners are expressly granted the fundamental right to "just compensation" for their property. Under the Court of Appeals' analysis, MCL 213.55(3) imposes a burden on that fundamental right by requiring owners to submit "written claims" detailing all their disagreements with not only the "items" for which the condemning agency submitted an offer, but with the valuation methodologies used to reach estimates of "just compensation" for items that were included. If condemned owners do not carry that burden, then they are "barred" from obtaining compensation. See MCL 213.55(3). In other words, if owners do not submit claims for every factor affecting the amount of just compensation, then they lose their right to contest the amount that the agency offered. Condemned owners would thus receive only the amount that the agency offered as its estimate as their "just compensation."

A statute that burdens a fundamental right is subject to strict scrutiny review, meaning that it must advance a legitimate governmental interest that is "truly compelling, threatening the safety or welfare of the state in a clear and present manner." People v DeJonge, 442 Mich 266, 287; 501 NW2d 127 (1993). The interest behind MCL 213.55(3) is attempting to save money for condemning agencies by limiting liability for fee reimbursement and denying unwitting property owners their fundamental right to just compensation. Under the Court of Appeals' application of MCL 213.55(3), if a condemned owner does not act within a short period to submit a written claim for factors affecting the value of the taken land, the

owner will lose its right to seek just compensation.[11] After all, when determining market value to establish just compensation, all factors affecting value must be taken into account. See Silver Creek, 471 Mich at 378. The Court of Appeals now requires property owners to submit written claims for these factors. If the owner fails to do so, it will be "barred" from presenting evidence about that factor, denying the owner its ability to seek constitutional just compensation. Saving money for condemning agencies at condemned owners' expense is not a compelling interest; it is an illegitimate interest that conflicts with the state and federal constitutions. See Dep't of Transp v VanElslander, 460 Mich at 131 (condemnation cannot enrich the public at an individual's expense).

Finally, the possibility of obtaining an extension does not save MCL 213.55(3) from its constitutional defects. MCL 213.55(3) provides condemned owners the possibility of an extension within which to file their claims, but only if there is "good cause," and the extension will not prejudice the agency. In fact, the statute threatens sanctions if the claims prove not to have merit. These conditions purport to allow an imposition on a condemned property owner's fundamental right to just compensation if there is no good cause or if an agency is inconvenienced. The property owner's fundamental right is just that – fundamental – and does not depend on good cause or lack of prejudice. It is an immutable constitutional right, but MCL 213.55(3), as applied by the Court of Appeals, severely burdens the

[11] Notably, MCL 213.55(3) requires owners to submit "written claims" within 60 days after a condemnation complaint is filed. That is 30 days before the condemning agency is even required to serve the complaint. See MCR 2.102. The timing of the UCPA's written claim requirement, coupled with the Court of Appeals' decision that a condemned owner must submit written claims in response to the condemning agency's valuation methodology, creates a trap for property owners: they must quickly identify all their disagreements with the methodology behind the amount of the agency's offer, or lose the ability to dispute the amount of the offer.

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fundamental right to just compensation. The Court of Appeals erred, because Michigan courts must favor interpretations of Michigan statutes that presume that the Legislature intended its acts to be consistent, rather than in conflict, with the constitution. See Silver Creek, 468 Mich at 379.

V. CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE, amicus curiae Real Property Law Section of the State Bar of Michigan respectfully requests that this honorable Court issue an opinion peremptorily reversing the Court of Appeals, or, alternatively, grant leave to appeal to consider the issue in this case.

Respectfully Submitted,

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